MOTION FILED
OCT 14 1980

No. 80-273

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

HART AND MILLER ISLANDS AREA ENVIRONMENTAL GROUP, INC., et al.,
Petitioners,

vs.

UNITED STATES ARMY CORPS OF ENGINEERS, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF OF BAIR ISLAND INVESTMENTS, INC., AND REDWOOD SHORES, INC., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

and

AMICI CURIAE BRIEF OF BAIR ISLAND INVESTMENTS, INC. AND REDWOOD SHORES, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

EDGAR B. WASHBURN
One Embarcadero Center
Suite 2407
San Francisco, CA 94111
Telephone: (415) 981-2121
Counsel for Amici Curiae

Of Counsel:
WASHBURN, KEMP & WAGENSEIL
One Embarcadero Center
Suite 2407
San Francisco, CA 94111
Telephone: (415) 981-2121

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7882

TABLE OF CONTENTS

	Page
Motion for leave to file amici curiae brief of Bair Island Investments, Inc., and Redwood Shores, Inc. in opposition	1
Amici curiae brief of Bair Island Investments, Inc. and Redwood Shores, Inc. in opposition	3
Interest of amici curiae	3
Argument	6
There is no conflict between the circuits on an important question of law which needs to be resolved by this Court	6
Conclusion	9

TABLE OF AUTHORITIES CITED

Cases

	Page
Citizens Committee for Environmental Protection v. U.S. Coast Guard, 456 F.Supp. 101 (D.N.J. 1978)	8
Citizens Committee for the Hudson Valley v. Volpe, 425 F.2d 94 (2d Cir. 1970), aff'g 302 F.Supp. 1083 (S.D.N.Y. 1969) cert. denied sub nom. Parker v. Citizens Committee for the Hudson Valley, 400 U.S. 949 (1970)	6, 7, 9
Hart and Miller Islands Area Environmental Group v. U.S. Army Corps of Engineers, No. 78-1911 (4th Cir., May 28, 1980)	5, 6, 8
Leslie Salt Co. v. Froehlke, 578 F.2d 742 (9th Cir. 1978)	5
Petterson v. Resor, 331 F. Supp. 1302, (D. Ore. 1971), vacated as moot sub nom. Citizens Committee for the Columbia River v. Callaway, 494 F.2d 124 (9th Cir. 1974)	7, 8
Sierra Club v. Morton, 400 F.Supp. 610 (N.D. Cal. 1975) aff'd in part, rev'd in part sub nom. Sierra Club v. Andrus, 610 F. 2d 581 (9th Cir. 1979), petition for cert. pending sub nom. California v. Sierra Club, No. 79-1252	8
Wisconsin v. Illinois, 278 U.S. 367 (1928)	6

Statutes and Regulations

Act of September 28, 1850, 9 Stat. 519, 43 U.S.C. § 982	4
33 U.S.C. § 401 et seq.	5, 6, 7, 8
33 C.F.R. § 3224.4	5

Miscellaneous

Public Land Commission Committee on Codification, The Public Domain (1884)	4

No. 80-273

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

HART AND MILLER ISLANDS AREA ENVIRONMENTAL GROUP, INC., et al.,
Petitioners,

vs.

UNITED STATES ARMY CORPS OF ENGINEERS, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF OF BAIR ISLAND INVESTMENTS, INC., AND REDWOOD SHORES, INC., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Bair Island Investments, Inc., and Redwood Shores, Inc., hereby respectfully move this Court, pursuant to Supreme Court Rule 36.1, for leave to file the attached Brief of Amici Curiae in opposition to the petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit. The consents of the attorneys for respondents United States Army Corps of Engineers, Clifford L. Alexander, Lt. Gen. John W. Morris, Col. G. K. Withers,

State of Maryland and Steamship Trade Association of Baltimore, Inc., have been obtained. Written consents will be filed with the Court as soon as they are received by counsel. The consent of the attorneys for the petitioners was requested but refused.

The interest of amici Bair Island Investments, Inc. and Redwood Shores, Inc., is set forth in the attached Brief of Amici Curiae. Amici note that the Sierra Club has filed a motion for leave to file an amicus curiae brief in support of the petition for writ of certiorari herein. The Sierra Club and Bair Island Investments, Inc. are opposing parties in an action now pending in the United States Court of Appeals for the Ninth Circuit involving the same issue presented by the decision below.

Respectfully submitted,

EDGAR B. WASHBURN
One Embarcadero Center
Suite 2407
San Francisco, CA 94111
Counsel for Amici Curiae

Of Counsel:
WASHBURN, KEMP & WAGENSEIL
One Embarcadero Center
Suite 2407
San Francisco, CA 94111

October 13, 1980

No. 80-273

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

HART AND MILLER ISLANDS AREA ENVIRONMENTAL GROUP, INC., et al.,
Petitioners,

vs.

UNITED STATES ARMY CORPS OF ENGINEERS, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

AMICI CURIAE BRIEF OF BAIR ISLAND INVESTMENTS, INC. AND REDWOOD SHORES, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

INTEREST OF AMICI CURIAE

Bair Island Investments, Inc. is the owner of approximately 3,000 acres of former tidal marshland located near the west shore of the south San Francisco Bay known as Bair Island. Bair Island Investments, Inc. is also the defendant-respondent in an action entitled *Sierra Club, et*

al. v. Leslie Salt Co., et al., No. 80-4095, now pending in the United States Court of Appeals for the Ninth Circuit.[1]

Redwood Shores, Inc. owns similar property of comparable size along San Francisco Bay immediately north of Bair Island. This property is also former tidal marshland that has been reclaimed and developed as a residential community known as Redwood Shores.

Bair Island and Redwood Shores were both patented to the State of California by the United States as swamp and overflowed lands under the Arkansas Swamp Act. Act of September 28, 1850, 9 Stat. 519, now codified at 43 U.S.C. § 982 *et seq.* In total, California received almost two million acres of swamp and overflowed lands from the United States under the Arkansas Swamp Act. See Public Land Commission Committee on Codification, The Public Domain (1884). Most of these lands (including Bair Island and Redwood Shores) were sold by California into private ownership and reclaimed as contemplated by the Arkansas Swamp Act. This reclamation process required the construction of levees (which could also be called "dikes") around the perimeter of the marshes to prevent tidal inundation (in the case of lands bordering tidal waters). The lands have since been developed and now support many of the communities bordering San Francisco Bay.

---

[1]Bair Island Investments, Inc., was formerly known as Mobil Oil Estates (Bair Island Investments) Ltd. Mobil Oil Estates (Bair Island Investments) Ltd. acquired the property in question from Leslie Salt Co. in 1975. At the time this litigation commenced in 1972, Leslie Salt Co. was the owner of the property at issue.

Most of California's swamp and overflowed lands, including those bordering tidal waters, were reclaimed before the U.S. Army Corps of Engineers asserted any form of jurisdiction over such lands under the Rivers and Harbors Act of 1899 or any of its predecessor statutes.[2] Recognizing this fact, the Corps of Engineers' own regulations exempt *inter alia* those structures constructed in connection with the reclamation of swamp and overflowed lands from the permit requirement of Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403, if they were constructed prior to the time that the Corps of Engineers asserted jurisdiction over such lands. 33 C.F.R. § 322.4. To the extent that the reclamation of areas such as Bair Island and Redwood Shores required the leveeing or "diking" of navigable sloughs or other navigable water bodies within the swamp and overflowed lands, Section 10 permits were in fact issued.

The nature of the levees used in reclaiming the swamp and overflowed lands surrounding San Francisco Bay, i.e., whether or not they are "dikes" within the meaning of Section 9 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 401, has been called into question in *Sierra Club, et al. v. Leslie Salt Co., et al., supra.* The decision of the United States District Court in that case adopted virtually the same reasoning as the Fourth Circuit's decision in *Hart and Miller Islands Area Environmental Group, et al. v.*

---

[2]The Corp of Engineers' assertion of jurisdiction over former marshlands surrounding San Francisco Bay under the Rivers and Harbors Act of 1899 was the subject of the Ninth Circuit's decision in *Leslie Salt Co. v. Froehlke,* 578 F.2d 742 (9th Cir. 1978).

United States Army Corps of Engineers, et al., and applies with equal force to the lands owned by amici Bair Island Investments, Inc. and Redwood Shores, Inc.

ARGUMENT

THERE IS NO CONFLICT BETWEEN THE CIRCUITS ON AN IMPORTANT QUESTION OF LAW WHICH NEEDS TO BE RESOLVED BY THIS COURT

Petitioners' petition for writ of certiorari is based on a supposed conflict between the decision of the Fourth Circuit below and the Second Circuit's opinion in *Citizens Committee for the Hudson Valley v. Volpe,* 425 F.2d 97 (2d Cir. 1970), *aff'g* 302 F.Supp. 1083 (S.D.N.Y. 1969), *cert. denied sub nom. Parker v. Citizens Committee for the Hudson Valley,* 400 U.S. 949 (1970). They further contend that, as a result of this conflict, the district courts have been confused on the issue presented here. The fact of the matter is, however, that the decisions subsequent to *Hudson Valley* are uniform. Every district court that has considered the question since the Second Circuit's decision has rendered a result consistent with the opinion of the Fourth Circuit.

In order to appreciate the consistency of the lower court decisions in this area, it is necessary to understand something of the merits of this controversy. It is conceded by virtually all parties that the language of Sections 9 and 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401 and 403, are not models of unambiguous statutory draftsmanship. On their face, the interrelationship between the two sections is ambiguous. In *Wisconsin v. Illinois,* 278 U.S. 367 (1928), this Court was called on to construe these

two sections and to determine whether the diversion of water by the City of Chicago from Lake Michigan required Congressional authorization under Section 9 or approval from the Secretary of War only under Section 10. Observing that the statutory language was ambiguous, this Court relied both on the practical effect of requiring special legislation pursuant to Section 9 and on the Corps of Engineers' long-standing administrative practices and concluded that "[t]his construction of § 10 is sustained by the uniform practice of the War Department for nearly thirty years. Nothing is more convincing in interpretation of a doubtful or ambiguous statute." *Wisconsin v. Illinois, supra,* at 413.

The controversy here concerns the meaning of the word "dike" in Section 9. In *Citizens Committee for Hudson Valley v. Volpe, supra,* neither the District Court nor the Second Circuit were presented with any evidence of either the legislative history of Sections 9 and 10 or the consistent administrative practices of the U.S. Army Corps of Engineers under those sections. Relying solely on the dictionary definition of the word "dike," the District Court and the Second Circuit concluded that anything which could be called a dike was a dike within the meaning of Section 9.[3] However, this evidence was introduced in subsequent cases, beginning with *Petterson v. Resor,* 331 F. Supp. 1302 (D. Ore. 1971), *vacated as moot sub nom. Citizens Committee for the Columbia River v. Callaway,* 494 F.2d 124 (9th Cir. 1974). That decision and the subsequent

---

[3]The Second Circuit devoted only one paragraph to the consideration of this issue. 425 F.2d at 106. The Court's decision was primarily concerned with questions of standing.

decisions in *Citizens Committee for Environmental Protection v. United States Coast Guard,* 456 F.Supp. 101 (D.N.J. 1978), and in the Fourth Circuit below all concluded, based on a review of the legislative history and the Corps of Engineers' consistent and longstanding administrative practices, that a "dike" within the meaning of Section 9 was a structure which completely spanned a navigable waterway. *Petterson v. Resor, supra,* at 1306; *Citizens Committee for Environmental Protection v. United States Coast Guard, supra,* at 113; *Hart and Miller Islands Area Environmental Group v. United States Army Corps of Engineers, supra,* slip op. at 28-29. The only other decision to touch on this issue, *Sierra Club v. Morton,* 400 F.Supp. 610 (N.D. Cal. 1975), *aff'd in part, rev'd in part sub nom. Sierra Club v. Andrus,* 610 F.2d 581 (9th Cir. 1979), *petition for cert. pending sub nom. California v. Sierra Club,* No. 79-1252 (filed February 13, 1980), does not, as petitioners contend, create a conflict. In that case, the "dike" in question was a structure which completely spanned a navigable waterway. 400 F.Supp. at 626-627. That structure was clearly a "dike" under either definition of the term.

The particular issue presented here has arisen in only a handful of cases. The project involved in the decision below is itself even more unique. Diked disposal areas such as those involved below are not used for dredge disposal in areas such as San Francisco Bay, where the dredge spoils are dumped offshore. Thus, the petition for certiorari herein not only raises a settled question of law, but also raises it in a relatively unique context.

Petitioners are attempting to create a conflict between the circuits where none in fact exists. Moreover, they are urging the adoption of an impractical and unreasonable construction of the term "dike" which is wholly inconsistent with both the legislative history of the Rivers and Harbors Act and eighty years of consistent administrative practice. The Fourth Circuit's decision below is representative of the conclusion reached by every court which has considered the legislative history of the Rivers and Harbors Act of 1899 and the Corps of Engineers' administrative interpretation of that statute. To the extent that *Citizens Committee for Hudson Valley v. Volpe* holds to the contrary, it has not been followed by the other courts. There is thus no important unsettled question of law requiring resolution by this Court at the present time.

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit should be denied.

Respectfully submitted,

EDGAR B. WASHBURN
One Embarcadero Center
Suite 2407
San Francisco, CA 94111
Counsel for Amici Curiae

Of Counsel:
WASHBURN, KEMP & WAGENSEIL
One Embarcadero Center
Suite 2407
San Francisco, CA 94111

October 13, 1980